Supreme Court, U. S.
FILED
MAR 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1283

MILTON A. CALESNICK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

Milton A. Calesnick, *Petitioner*

v.

United States of America, *Respondent*

Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

MILTON A. CALESNICK, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on February 18, 1977.

OPINIONS BELOW

There are no opinions from the Court of Appeals or from the District Court below which are reported.

JURISDICTION

The judgment of the Court of Appeals below (Appendix A) was entered on February 18, 1977. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant is deprived of his Fifth Amendment right to remain silent by custodial inter-

rogation by government agents after he has invoked his Miranda rights.

2. Whether the admission into evidence of involuntary statements extracted from a criminal defendant is error requiring a new trial.
3. Whether a criminal defendant is deprived of his Sixth Amendment right to counsel by the violation of an instruction given to government agents by defense counsel that defendant was not to be interrogated and did not intend to answer any questions.
4. Whether a criminal defendant's right to cut off questioning is "scrupulously honored" by government agents in accord with *Michigan v. Mosley*, 423 U.S. 96., when the defendant is not given a fresh set of warnings prior to the questioning which occurs the day following his arrest, his defense counsel is not summoned nor present during said questioning and the questioning was concerning the same criminal episode for which the defendant was initially arrested.
5. Whether a criminal defendant's Fourth Amendment right to privacy from unwarranted governmental intrusions is violated by the actions of government agents who attempt to obtain probable cause for the issuance of a search warrant by means of "peeping" into a window.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution.

2. The Fifth Amendment, United States Constitution.

3. The Sixth Amendment, United States Constitution.

4. The Statutes under which Petitioner was prosecuted, though nothing turns on their terms, are 21 U.S.C. §841 (a)(1) and 21 U.S.C. §844 (a) which sections provide as follows:

"21 U.S.C. §841 (a) (1) Prohibited Acts A—
Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

"21 U.S.C. §844 Penalty for Simple possession . . .

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice. . . ."

5. The Statute under which Petitioner sought appellate review was 28 U.S.C. §1291 which provides as follows:

"1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. *Course of proceedings in the case now before this Court.*

On February 27, 1976, in a cause then pending in the United States District Court for the Eastern District of Pennsylvania, entitled *United States of America v. Milton A. Calesnick*, Criminal No. 75-739-1, petitioner was found guilty by a jury on an indictment of five counts charging violations of 21 U.S.C. §841 (a)(1) and 21 U.S.C. §844(a) for manufacture and possession with intent to deliver a controlled substance, to wit, methaqualone and possession of other controlled substances.

On July 28, 1976, the District Court entered a judgment and commitment order (Appendix B) and petitioner was sentenced to five years imprisonment and two years special parole on counts one and two to run concurrently. Sentence was suspended on counts three through five. The judgment and sentence was affirmed by the United States Court of Appeals for the Third Circuit in *United States of America v. Milton A. Calesnick*, No. 76-2119 in February, 1977 (Appendix A). A motion to stay the mandate of the within matter was filed with the Court of Appeals on March 3, 1977.

B. *Relevant facts concerning the underlying conviction for manufacture and possession with intent to distribute controlled substances.*

Petitioner, a chemist, was arrested after a search and seizure had been made of his two business premises by drug enforcement agents on June 13, 1975. The probable cause stated in one of the search warrants was established by means of an unlawful search of petitioner's premises by an agent who had "peeped" through his window. Petitioner was warned of his *Miranda* rights in the presence of his attorney, Robert M. Pressman. Mr. Pressman immediately

advised the agents that petitioner would not make any statements to them or answer any questions. The following morning, after petitioner had been detained in a police detention cell all night and had been unable to sleep or eat for a twenty-eight hour period, drug agent, Wallace Mignault, violated this instruction of counsel and proceeded to extract damaging statements from petitioner without giving petitioner fresh warnings or summoning counsel.

The damaging admissions were contested at a motion to suppress evidence which was litigated prior to trial. The District Court below concluded (Petitioner's Brief to Court of Appeals at 30) as a finding of fact that said statements were extracted during custodial interrogation. Nevertheless, the damaging admissions were admitted as evidence at trial, over objections by petitioner that they were involuntary and were extracted in violation of his Fifth and Sixth Amendment rights.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Court of Appeals Has Decided a Federal Question in a Way Which Conflicts With Numerous Applicable Decisions of This Court.

This case involves the involuntary extraction of incriminating statements during custodial interrogation of petitioner after he had invoked his Fifth Amendment right to remain silent and his Sixth Amendment right to assistance of counsel.

(a) *Violation of petitioner's Fifth Amendment rights.*

The statements were extracted from petitioner after the arresting officers had been advised by defense counsel and petitioner that petitioner was not to be questioned. Nevertheless, the agent in charge of the investigation in the case, did question and interrogate petitioner the day

following petitioner's arrest without the presence of counsel. The agent thereby violated the specific instruction which had been made to him by petitioner's attorney. The petitioner's alleged answers to the agent's questions were that he had tried to make methaqualone but was not successful and that he did not need a specific ingredient to make the drug because he used a large heat reactor in its place. Since petitioner had been charged with the manufacture and possession with intent to deliver methaqualone, the statements extracted from petitioner were certainly harmful and were a direct link in the chain of evidence used to convict. The statements certainly fall within the protection of the Fifth Amendment even if they do not constitute an express confession or admission of all of the elements of the crimes charged. *Harrison v. United States*, 392 U.S. 219; *Malloy v. Hogan*, 378 U.S. 1; *Murphy v. Waterfront Commissioners*, 378 U.S. 52.

The evidence extracted from petitioner was clearly contrary to the specific pronouncements of *Miranda v. Arizona*, 384 U.S. 436. It is also settled that the truth of incriminating statements does not remove them from the protection of the Fifth Amendment for "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or part, upon an involuntary confession without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno*, 378 U.S. 468, 376.

(b) *Violation of Sixth Amendment.*

The petitioner's Sixth Amendment right to counsel was violated by the questioning of the drug enforcement agent after the agent had been instructed that petitioner not be interrogated and would not answer any questions. Such questioning, without the protection afforded by the

presence of counsel, contravenes the basic dictates of fairness and the fundamental rights of persons charged with crime. *Massiah v. United States*, 377 U.S. 201.

In light of the circumstances of the case, petitioner could not effectively have waived his right to counsel for purposes of interrogation in the absence of counsel. To hold otherwise would make it impossible for defense counsel fully to protect his client's rights without staying with him the entire time the client is detained by the authorities. *Brewer v. Williams*, 509 F.2d 227 (8th Cir. 1975) *cert. granted*, 423 U.S. 1031.

(c) *Petitioner's right to cut off questioning was not scrupulously honored.*

Inasmuch that the interrogation was conducted nineteen hours after petitioner's rights had been invoked and no new fresh warnings were given to petitioner prior to the renewal questioning, a heavy burden was thrust upon the government to show that petitioner's right to cut off questioning had been "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96. This Court recently indicated in *Mosley* that when the defendant was (1) readvised of his rights prior to the renewed questioning by a (2) different officer as to a (3) different crime, statements then obtained were not in violation of that defendant's rights. In the instant case, the Government concedes in its brief to the Third Circuit (at 30) that no fresh *Miranda* warnings were given, petitioner's attorney was not present and the questions by the same officer were designed to elicit responses related to the instant case. Clearly, the Government has not met the heavy burden imposed upon it by *Mosley* to show that petitioner's right to cut off questioning had been "scrupulously honored."

II. The Court of Appeals Has Decided Important Questions of Federal Law in a Way Which Conflicts With Other Federal Circuit Courts.

The petitioner respectfully urges that the decision of the circuit court below is erroneous and at variance with the decisions of other circuit courts in the following respects:

(a) *Conflict in federal law on legality of visual searches by government agents.*

The conduct of the drug enforcement agent in standing in front of petitioner's property and "peeping" in his window was clearly in contravention of petitioner's Fourth Amendment right to be free from unreasonable searches and seizures. It is well settled that the Fourth Amendment embodies a comprehensive right of privacy against unwarranted governmental intrusions. In the instant case, the agent's conduct constituted an illegal search because his trip to petitioner's window occurred at a time when he lacked probable cause to believe that any crime had or was occurring thereon. Contrary to the view of the lower circuit court, the Fifth Circuit has continually stated that an eye can commit a trespass. *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955); *Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968). Those cases have held that an actual intrusion can be accomplished visually. Furthermore, the Government cannot rely on the "plain view doctrine" because that exception does not apply where the observing officer has physically invaded a constitutionally protected area in order to secure the view. *United States v. Davis*, 423 F.2d 974 (5th Cir. 1970).

In the instant case, the initial intrusion which brought the agent into the view of alleged contraband was not lawful. The agent subsequently received a search warrant based upon his illegal observations. A police search in contravention of a constitutional guarantee is not made

lawful by what it brings to light. The search must be good or bad when it starts and does not change character from its success or failure. *United States ex. rel. McArthur v. Rundle*, 402 F.2d 701 (3rd Cir. 1968).

The Fifth Circuit, unlike the Third Circuit below, would not have affirmed the conviction of the petitioner upon evidence discovered by a visual trespass.

The petitioner therefore believes that the decision in his case is erroneous and at variance with the decisions of the Fifth Circuit. The conflict in federal law should be resolved by this Court.

(b) *Conflict in federal law on whether petitioner was denied the assistance of counsel.*

The precise issue upon which petitioner seeks review by this Court has been determined in his favor by numerous federal circuit courts. Thus, a conflict in federal law exists and sound judicial discretion dictates that the issue be finally settled by this Court.

The Second, Fifth and Eighth Circuits have all held, contrary to the decision in this case, that a defendant is denied the Sixth Amendment right to the assistance of counsel when defense counsel has advised both his client and the authorities that no further interrogation was to be conducted and the authorities nevertheless extract incriminating evidence by questioning the defendant. See *Magoon v. Reincke*, 416 F.2d 69 (2nd Cir. 1969); *United States v. Wedra*, 343 F. Supp. 1183 (S.D. N.Y. 1972); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), and *Brewer v. Williams*, 509 F.2d 227 (8th Cir. 1975), *cert. granted*, 423 U.S. 1031.

Brewer v. Williams, supra, is presently before this Court for review. The same important constitutional considerations which this Court must resolve in *Brewer v. Williams, supra*, are at issue in the instant appeal. This Court should grant certiorari in order to simultaneously decide the meritorious issues which these two cases present.

CONCLUSION

The judgment below represents a departure from the fundamental decisions of this Court which have required that convictions which are based in any manner upon involuntary confessions be set aside. As such, this case represents a breach of the Fifth Amendment right to remain silent and the Sixth Amendment right to the assistance of counsel. The judgment below is also contrary to numerous decisions of this Court and other federal circuit courts, which decisions were designed to protect citizens from improper or overzealous behavior by government agents. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2119

UNITED STATES OF AMERICA

v.

MILTON A. CALESNICK, *Appellant*

(Criminal No. 75-739-1, E. D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
February 17, 1977

Before SEITZ, *Chief Judge*,
Van Dusen and Weis, *Circuit Judges*.

Judgment Order

After consideration of all the issues raised by appellant, to-wit:

(1) Was the evidence adduced at trial sufficient beyond a reasonable doubt to have convicted defendant?

(2) Should a new trial be granted to defendant in that the government's attorney continuously used inflammatory and improper dialogue in both his opening and closing statements to the jury and at trial?

(3) Did the court err in allowing the government prosecutor to cross-examine defendant's character witnesses about an alleged arrest of defendant for perjury and other crimes of falsehood?

(4) Were the defendant's Fourth Amendment rights infringed by the issuance of search warrant without probable cause and by unreasonable and illegal searches and seizure by government agents?

(5) Were the Defendant's Fourth Amendment rights infringed by the forced entry by government agents without notice and by the initiation of searches without having given the defendant copies of the warrants at the time of entry over his objection and demand?

(6) Did the court err in allowing statements of defendant into evidence which had been extracted during custodial interrogation after defendant had chosen to exercise his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel?

IT IS ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/
Chief Judge

Attest:

/s/ THOMAS F. QUINN
Clerk

Dated: February 18, 1977

APPENDIX "B"

[Caption Omitted in Printing]

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, July 28, 1976.

☐ **Without Counsel.**

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **With Counsel** (Name of Counsel). Robert M. Pressman, Esq.

☐ **Guilty,** and the court being satisfied that there is a factual basis for the plea,

☐ **Nolo Contendere,**

☒ **Not Guilty.**

There being a finding/verdict of

☐ **Not Guilty.** Defendant is discharged.

☒ **Guilty.**

Defendant has been convicted as charged of the offense(s) of: manufacture of Schedule II controlled substance [21 U.S.C. §841(a)(1)] on Count I; possession of Schedule II controlled substance [21 U.S.C. §844(a)] on Counts II, III, IV and V;

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years to be followed by Special Parole for a period of Two (2) Years, pursuant to 18 U.S.C. §4205(a) on Count I. On Count II, the defendant is committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years to be followed by Special Parole for a period of Two (2) Years, pursuant to 18 U.S.C. §4205(a); said period of imprisonment and Special Parole to run concurrently with the sentence imposed on Count I above. On each of Counts III, IV and V, the imposition of sentence is suspended.

It is further ordered that the execution of the sentence is STAYED pending appeal.

* * *

Signed by

☒ U.S. District Judge

☐ U.S. Magistrate

Joseph L. McGlynn, Jr.

Certified as a true copy on
this date 7/28/76
By B. Bearman

☐ Clerk

☒ Deputy

No. 76-1283

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MILTON A. CALESNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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MILTON A. CALESNICK, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1977. The petition for a writ of certiorari was filed on March 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the use in evidence of statements made to law enforcement officials by petitioner after his arrest and in the absence of retained counsel violated petitioner's right to the assistance of counsel or his privilege against compelled self-incrimination.

2. Whether the Fourth Amendment was violated when a federal agent, who was standing on a public sidewalk, looked through a window into petitioner's premises and observed a controlled substance.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of the manufacture and possession of methaqualone with intent to distribute it (Counts I and II), in violation of 21 U.S.C. 841(a)(1), and on three counts of unlawful possession of other controlled substances, in violation of 21 U.S.C. 844(a). He was sentenced on Counts I and II to concurrent terms of five years' imprisonment to be followed by two years' special parole. Imposition of sentence on the remaining counts was suspended.

1. The sufficiency of the evidence of petitioner's guilt is not in dispute. In brief, it showed that on June 13, 1975, Drug Enforcement Administration (DEA) agents, acting pursuant to a warrant, searched petitioner's premises at 832 North Third Street, Philadelphia, Pennsylvania, and seized more than 1,000 grams of methaqualone, 35 drums of N-acetyl anthranilic acid (which petitioner had recently purchased), several empty drums that had contained that same chemical, and large quantities of ortho toluedine and anthranilic acid (1 Tr. 19-28, 34-35, 127, 138-139).[1] The search also produced a large heat reactor, a tableting

[1]"Tr." and "S.H." refer, respectively, to the four-volume trial transcript and the two-volume transcript of the pre-trial suppression hearing. "G. Ex." refers to government exhibits. "App." refers to petitioner's appendix in the court of appeals.

machine, and tablet punches (1 Tr. 26-35, 39, 71-72, 78-79, 85, 101, 109, 122-123; 2 Tr. 83).[2]

Later that day, DEA agents searched (also pursuant to a warrant) Cal-Vet Labs, Inc. (petitioner's corporation) at 320 Race Street, Philadelphia. That search uncovered, *inter alia*, six bottles labelled "Pentobarbital Sodium Tablets" and four bottles of liquid butabarbital, phendimetrazine, and sodium pentobarbital (1 Tr. 76, 99-100, 103, 124-125), each of which is a controlled substance (2 Tr. 18-19, 23). Petitioner, a chemist, was not registered with the DEA either to manufacture or to possess any controlled substances (G. Ex. 16; 2 Tr. 27, 33-34).[3]

[2]The methaqualone seized was brown in color, while pharmaceutical grade methaqualone is normally white (1 Tr. 140-142). Ortho toluedine and N-acetyl anthranilic acid are primary ingredients in the manufacture of methaqualone (1 Tr. 127-128); indeed, with the aid of a heat reactor, methaqualone can be produced from those two components alone (1 Tr. 137). Although N-acetyl anthranilic acid can be used legitimately to manufacture synthetic grape flavoring, the quantity of the chemical seized was sufficient to produce approximately one ton of such flavoring (1 Tr. 160).

The building that was searched was not marked or advertised as a laboratory, and the windows were boarded over (1 Tr. 73-74; G. Exs. 11-14).

[3]Testifying in his own behalf, petitioner maintained that the methaqualone seized was the residue of an experiment he had conducted in 1973, prior to the time the substance became federally controlled, and that he had destroyed the methaqualone produced at that time (2 Tr. 71-72, 77-78). He contended that he had purchased the N-acetyl anthranilic acid for experiments and for production of grape flavoring (2 Tr. 92, 97). According to petitioner, the sodium pentobarbital and butabarbital had been part of his stock when he sold veterinary supplies and the quantities seized had been at his 320 Race Street laboratory for many years before the substances were controlled (see, *e.g.*, 2 Tr. 58-59). He denied knowledge of the presence of the phendimetrazine (2 Tr. 58).

2. After the search at 320 Race Street, petitioner's attorney arrived in response to a telephone call from petitioner, who was then arrested and given *Miranda* warnings (1 S.H. 24, 33). Petitioner stated that he understood his rights, and his lawyer instructed him not to make any statements (1 S.H. 25, 33). No questions were asked of petitioner (1 S.H. 25-26).

The following morning, DEA Special Agent Wallace Mignault picked up petitioner from the jail where he had spent the night (1 S.H. 27; 1 Tr. 41). They ate lunch and then returned, at about noon, to the DEA office to await petitioner's arraignment and bail hearing, which was scheduled for approximately 1:30 p.m. (1 S.H. 27; 1 Tr. 41). At the DEA office, the agent and petitioner, who was "very talkative" (1 S.H. 27), engaged in general conversation. During that conversation, petitioner volunteered that he had tried unsuccessfully to make methaqualone (1 S.H. 27; 1 Tr. 42, 98). When Agent Mignault commented that the search at 832 North Third Street disclosed no polyphosphoric acid (a chemical that can be used to make methaqualone), petitioner said he did not need that chemical because he used a heat reactor instead (1 S.H. 27).

Following a pretrial hearing on petitioner's motion to suppress these statements, the district court found that Agent Mignault's comment about the absence of polyphosphoric acid "was designed to elicit a response and, therefore, it did constitute interrogation" (2 S.H. 44).[4] By

[4]Petitioner also moved to suppress several other statements he had made the previous day. Advised by the DEA agents that they were executing a warrant issued to search 832 North Third Street for methaqualone, petitioner queried, "What's that?" (1 Tr. 172-173). During the course of the search, he volunteered, "How was I to know to register with the government to produce or possess controlled substances?" and, "If I was making methaqualone it was by mistake" (1 Tr. 102). The district court ruled that these statements were voluntary and spontaneous and therefore admissible (2 S.H. 43-45). Additionally, when asked what he intended to do with the N-acetyl anthranilic acid, petitioner advised that he was using it for grape flavoring that he intended to sell to a Mr. Gillespie (3 Tr. 80-81). This statement was ruled inadmissible (App. 9) and was introduced only in rebuttal after petitioner testified he had not made such a statement (see 3 Tr. 52-54).

order of February 12, 1976, however, the court ruled that the statements were admissible, and they were introduced against petitioner at trial (App. 9).[5] In accordance with the provisions of 18 U.S.C. 3501, the district court also permitted the introduction by the defense of evidence relevant to the issue of voluntariness[6] and instructed the jury (4 Tr. 9-10) to weigh the statements in light of all attendant circumstances.

[5]At the conclusion of the suppression hearing, the court stated (2 S.H. 43-44):

> As to the remarks of or response to the remarks by Agent Mignault on the day following, it is my finding that that remark was designed to elicit a response from [petitioner] and, in spite of the Miranda warnings, he did respond.
>
> I am not too sure at this point what the effect of him changing his mind or failing to follow his lawyer's advice would have. I guess maybe you had better brief that as well.
>
> * * * [W]ell, I will rule that the comment by Mr. Mignault was designed to elicit a response and, therefore, it did constitute interrogation, but that doesn't necessarily make it suppressible. So I want you to brief that point.

These statements indicate that the court's subsequent ruling that petitioner's statements were admissible was based on the court's determination that petitioner had knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

[6]Petitioner maintained that he had told Agent Mignault in general terms that the manufacture of methaqualone did not necessarily require polyphosphoric acid (2 Tr. 115; 3 Tr. 54-55). He further testified that these statements were made after he spent the night in jail without sleeping facilities or food until he lunched with Mignault (2 Tr. 116).

ARGUMENT

1. Petitioner contends (Pet. 5-7, 9) that the statements made on the day following his arrest were obtained in violation of his Fifth Amendment privilege against compelled self-incrimination and his Sixth Amendment right to counsel and therefore should not have been admitted into evidence. Even though the district court found that Agent Mignault's comment regarding the absence of a particular chemical constituted interrogation, we submit that, taking into account all of the circumstances in this case, the statements were admissible. Even if their admission was error, however, it was harmless beyond a reasonable doubt.

a. Statements obtained after a person in custody has declined to answer questions are not inadmissible *per se*. *Michigan* v. *Mosley*, 423 U.S. 96, 102. Rather, their admissibility "depends under *Miranda* [v. *Arizona*, 384 U.S. 436] on whether his 'right to cut off questioning' was 'scrupulously honored' " (*id.* at 104). The record reflects that this standard was met here.

On the night of petitioner's arrest his lawyer instructed him not to make any statements. The agents respected petitioner's refusal to submit to questioning and at no time either asked him whether he wished to change his mind or sought to persuade him to do so. "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Michigan* v. *Mosley*, *supra*, 423 U.S. at 105-106.

When Agent Mignault took petitioner to lunch on the following day, he initially did no more than engage in

conversation of a general nature with petitioner.[7] *Miranda* warnings were not given,[8] and the district court found that one statement made by the agent was designed to elicit a response even though it did not take the form of a question. But there is no evidence that petitioner was at any time subjected to ill treatment of any sort, to lengthy custodial interrogation, or to conscious overreaching on the part of the agent. Nor is there any evidence that petitioner was unable to appreciate the circumstances in which he found himself. To the contrary, petitioner is highly educated (with a doctorate in chemistry) and was familiar with the processes of the criminal law by virtue of earlier arrests in February and May 1975. In light of the totality of these circumstances (see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-227), it seems plain that petitioner was aware that he did not have to say anything to Agent Mignault and that his decision voluntarily to raise the subject of his experience with methaqualone amounted to a knowing and intelligent waiver of his privilege against self-incrimination. *Miranda* v. *Arizona*, 384 U.S. 436, 475; cf. *United States* v. *Johnson*, 529 F. 2d 581 (C.A. 8), certiorari denied, 426 U.S. 909; *Smith* v. *United States* 505 F. 2d 824 (C.A. 6).

b. Similarly, in the circumstances of this case, petitioner's voluntary mention to Agent Mignault of his attempts to manufacture methaqualone amounted to a knowing and intelligent waiver of his right to counsel.

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[7]The record does not indicate why petitioner's counsel was not present during this time. There is no suggestion, however, that his absence was the product of any conduct on the part of the government.

[8]Both at the suppression hearing and at trial Agent Mignault testified that petitioner voluntarily raised the subject of his experiences with methaqualone (1 S.H. 27-28; 1 Tr. 41-42, 97-98). Petitioner never contradicted this account of the conversation (see 2 S.H. 26-27; 2 Tr. 114-116; 3 Tr. 54-56).

Neither *Massiah* v. *United States*, 377 U.S. 201, nor *Brewer* v. *Williams*, No. 74-1263, decided March 23, 1977, requires suppression on these facts. In *Massiah*, after the defendant had been indicted on narcotics charges and was released on bail, federal agents arranged for an informant to elicit and secretly transmit to agents stationed nearby inculpatory information concerning the crime that was the subject of the indictment. In *Brewer*, the defendant, who was being sought in Des Moines, Iowa, in connection with the abduction of a child, surrendered and was arraigned in Davenport, Iowa, 160 miles away. The defendant was represented by counsel in both Des Moines and Davenport, and the Des Moines police officers who drove to Davenport to bring the defendant back promised both counsel that they would not question the defendant about the crime during the trip. In disregard of that agreement, however, one of the officers did interrogate the defendant, who in response directed the officers to the place where he had hidden the child's body.

Massiah and *Brewer* share the common characteristic of a predesigned attempt by law enforcement officials to take advantage of the absence of defense counsel in questioning a defendant about a crime after the Sixth Amendment right to counsel had attached. That characteristic is absent here. There is no evidence whatever that Agent Mignault engaged in casual conversation with petitioner with an ulterior motive to elicit damaging statements from him in the absence of his counsel. The remark that the district court found was intended to elicit a response came only after petitioner himself had voluntarily adverted to the subject matter of the crime for which he had been arrested. At that point, the agent was not obliged to close his ears or to assume the role of defense counsel on petitioner's behalf. Rather, he

was entitled to assume that petitioner, an educated man with a previous acquaintance with the criminal law, spoke of his experiences with methaqualone in full awareness that he was privileged to remain silent and to have his counsel present before submitting to any interrogation. Accordingly, the agent's remark concerning the absence from petitioner's laboratory of a chemical used to manufacture methaqualone did not constitute unlawful interrogation, and the admission into evidence of petitioner's response to that remark did not violate petitioner's right to the assistance of counsel.

c. In any event, even if petitioner's statement was erroneously admitted, any error was harmless beyond a reasonable doubt. The quantity of drugs seized, the manner in which they were stored and used in petitioner's premises, petitioner's ability and equipment to process the methaqualone into tablets, and petitioner's other admissible statements provided overwhelming evidence of guilt. There was therefore no reasonable possibility that the challenged evidence might have contributed to the conviction. See *Milton* v. *Wainwright*, 407 U.S. 371; *Chapman* v. *California*, 386 U.S. 18, 24.

2. On June 13, 1975, subsequent to the search at 832 North Third Street, Agent Mignault went to 320 Race Street, the premises of Cal-Vet Labs, Inc. While standing on the public sidewalk in front of the building, he observed through the glass door and window a bottle labelled "Paraldehyde" and a barrel similar to the drums of N-acetyl anthranilic acid he had just seen during the search at 832 North Third Street (1 S.H. 65-72; 1 Tr. 45, 61, 71). The agent then obtained a warrant to search 320 Race Street for paraldehyde, which is a controlled substance. The affidavit supporting the warrant set forth the above facts and incorporated by reference the search warrant affidavits for 832 North Third Street.

Contrary to petitioner's contention (Pet. 8-9), the agent's observation through the window did not violate petitioner's Fourth Amendment rights. It is settled that a visual observation by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the Fourth Amendment. *Ker* v. *California*, 374 U.S. 23, 42-43; *United States* v. *Johnson*, 506 F. 2d 674, 675 (C.A. 8), certiorari denied, 421 U.S. 917; *United States* v. *Walling*, 486 F. 2d 229, 236 (C.A. 9), certiorari denied, 415 U.S. 923; *James* v. *United States*, 418 F. 2d 1150, 1151 n. 1 (C.A. D.C.). Agent Mignault was lawfully situated on the public sidewalk (1 S.H. 66) when he looked through the "very big, large, glass window" and observed the bottle on a counter some 10 or 12 feet from the window (1 S.H. 65; 1 Tr. 71). "[T]he place was open and passersby could see inside" (1 S.H. 66). Moreover, the word "paraldehyde" was "unmistakable" (*ibid.*). Petitioner had no reasonable expectation of privacy with regard to what he knowingly exposed to the public. *Katz* v. *United States*, 389 U.S. 347, 351; cf. *United States* v. *Honore*, 450 F. 2d 31, 33 (C.A. 9), certiorari denied, 404 U.S. 1048 (items in residence observed through uncurtained window from public stairway); *United States* v. *Hanahan*, 442 F. 2d 649, 654 (C.A. 7) (evidence viewed through window from public sidewalk); *Ponce* v. *Craven*, 409 F. 2d 621, 625 (C.A. 9), certiorari denied *sub nom. Ponce* v. *California*, 397 U.S. 1012 (activities seen through window in motel room).[9]

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[9]Petitioner is incorrect in asserting (Pet. 8) that the law in the Fifth Circuit is to the contrary. See *United States* v. *Shima*, 545 F. 2d 1026, 1028-1029 (C.A. 5), pending on petition for a writ of certiorari, No. 76-6268. *United States* v. *Davis*, 423 F. 2d 974 (C.A. 5), certiorari denied, 400 U.S. 836, *Texas* v. *Gonzales*, 388 F. 2d 145 (C.A. 5), and *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), upon which petitioner relies, are distinguishable. In each of those cases the visual observation was made possible by means of a physical trespass into a constitutionally protected area. Here, by contrast, the agent looked through the window from a public area where he had a right to be.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1977.

DOJ-1977-06